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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL SURETY COMPANY,
Plaintiff in Error

vs.

COUNTY OF LINCOLN,
Defendant in Error

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court of the District of Montana.

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STATEMENT OF THE ISSUES

The complaint on pages 2 to 29 of the record shows that on April 25, 1914, the County of Lincoln filed a complaint in the District Court of the Eleventh Judicial District of the State of Montana against the Coast Bridge Company, a corporation, and National Surety Company, a corporation, asking for a judgment in the amount of $30,000 and for costs of the suit.

The plaintiff charges that on the 18th day of December the Coast Bridge Company entered into a contract in writing with the County of Lincoln by the terms of which Coast Bridge Company, for and in consideration of the payment of certain sums of money, undertook and agreed to construct across the Kootenai river at Rexford, in the County of Lincoln, State of Montana, a steel bridge according to certain plans and specifications which are stated to be a part of the contract.

The complaint also discloses that in the month of February, 1912, the County of Lincoln and the Coast Bridge Company made certain modifications of the specifications which were attached to and made a part of the contract, and that by such changed and altered specifications the Coast Bridge Company agreed that all piles to be used in the construction of the bridge should be driven with a hammer weighing not less than two thousand pounds, and that the penetration of the last blow of such hammer falling twenty feet should not exceed one-half inch, and that if necessary

such piles should be shod with steel or cast iron shoes and properly ringed at the top with wrought iron rings to prevent their splitting and brooming, but that the defendant Coast Bridge Company failed and neglected to drive said piling with a hammer weighing not less than two thousand pounds falling twenty feet, so that the penetration at the last blow did not exceed one-half inch, and that by reason of the failure and neglect of the defendant Coast Bridge Company to drive said piling in accordance with the terms of said specifications the foundation of the center pier in said bridge became and was at all times insecure and unsafe, and by reason of the bottoms of such piling resting on insecure and shifting gravel and sand occasioned by the defendant Coast Bridge Company failing to drive such piling in accordance with the specifications the foundation of said middle pier was placed in great danger of being undermined and destroyed, and in the spring of 1913 by reason of the failure and neglect of the defendant Coast Bridge Company as aforesaid said center pier was washed away, toppled over and destroyed, and the entire bridge structure resting thereon entirely collapsed and rendered useless and of no value, to the damage of the County of Lincoln in the sum of $30,000.

It is also alleged that on the 18th day of December, 1911, the Coast Bridge Company and the defendant National Surety Company made, executed and delivered to the County of Lincoln their

obligation in writing in the penal sum of $30,000, conditioned to the effect that if the Coast Bridge Company should faithfully and truly observe and comply with all the terms, conditions and provisions of said contract and the plans and specifications mentioned, and should well and truly and fully do and perform all manner of things by them undertaken to be performed under said contract, then in such event said obligation should be null and void, otherwise to be and remain in full force and effect.

A copy of the bond is attached to the complaint and made a part thereof. A copy of the changed plans and specifications under date of February, 1912, is also attached to the complaint.

The complaint recites that the County of Lincoln paid the Coast Bridge Company $30,000 for the construction of the bridge, and it is stated in the complaint that the payments were made without knowledge or means of knowledge on the part of the County or its officers of any alleged defects in the construction of the bridge, or any failure on the part of the Coast Bridge Company to construct the same strictly in accordance with the contracts and plans and specifications therefor.

On page 61 of the record it is shown that pursuant to stipulation of the parties plaintiff was granted permission to amend the fourth paragraph of the complaint by alleging that the original contract was made on the 18th of December, 1911, and the agreement modifying the same on the 5th day

of February, 1912, thereby making the original contract and the agreement of February 5, 1912 Exhibit A to the complaint.

The case was removed to the federal court on the application of the National Surety Company (Record, pages 33 to 47).

No service of summons was ever secured on the Coast Bridge Company, and Coast Bridge Company was not a party to the case or judgment.

The National Surety Company filed an answer wherein the allegations of the complaint were both specifically and generally denied, except that the execution of the bond on the part of the National Surety Company was admitted.

The case was tried before the Court without a jury, upon the issues joined between the County of Lincoln and the National Surety Company, and judgment was rendered on the 11th of April, 1916, against the National Surety Company in the sum of $29,345.40.

ASSIGNMENTS OF ERROR.

I.

The District Court of the United States for the District of Montana erred in overruling and denying the objection to the introduction of any evidence on the part of the plaintiff in support of its complaint as amended, which objection was based upon the ground that said complaint as amended did not state facts sufficient to constitute a cause of action.

II.

The court erred in overruling and denying the motion of the defendant National Surety Company made at the close of the testimony for a judgment in its favor.

III.

Said court erred in holding and deciding that the complaint as amended stated a cause of action.

IV.

Said court erred in holding and deciding that the change and modification in the contract as made by the resolution of July 6, 1912 and the acceptance thereof by the defendant Bridge Company did not relieve and release the defendant National Surety Company from the liability provided for in the bond furnished by said Surety Company.

V.

The court erred in holding and deciding that the defendant National Surety Company was not

released and relieved from liability by reason of the plaintiff having made payments on the contract price to the Bridge Company before said payments were due, according to the contract between said plaintiff and said Bridge Company.

VI.

Said court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason of the change in the location of the center pier and the lowering of the floor of the bridge which constituted material departures from the plan for the construction of the bridge adopted by the contract between the said plaintiff and the Bridge Company.

VII.

The court erred in holding and deciding that the plaintiff is entitled to recover notwithstanding there was neither an allegation nor proof that the plans and specifications for the bridge were approved by the War Department of the United States, or that permission for the construction of said bridge had been obtained from said department.

VIII.

The court erred in holding and deciding that the plaintiff was entitled to recover notwithstanding the failure by plaintiff through its engineer or inspector to take any precaution to insure the performance of the contract by said Bridge Company.

IX.

The court erred in holding and deciding that the plaintiff was entitled to recover notwithstanding the bond furnished by the defendant National Surety Company had reference to the contract for the construction of a two-span riveted bridge, together with three concrete piers, while the bridge which was built was a two-span pin-connected bridge with one concrete and two tubular piers.

X.

Said court erred in rendering judgment for the plaintiff.

THE EVIDENCE.

The evidence shows that:

On December 18, 1911, Coast Bridge Company entered into a contract in writing with the County of Lincoln for the construction of a bridge across the Kootenai River at Rexford, according to certain plans and specifications which are attached to and made a part of the contract. (See Record, pages 63 to 85.)

That by the terms of the specifications the bridge was either to be constructed under Plan A (p. 70) or Plan B (p. 71). If constructed under Plan A it was to consist of two 200 foot riveted spans for superstructure resting on one concrete stream pier and two concrete shore piers, or tubular piers if so desired. The contract itself (p. 65) shows that the bridge was to be constructed according to Plan A, sheets numbers 1 and 2, and to be upon three concrete piers.

The substituted contract shown on pages 8 to 29 provides that the Bridge Company was to construct the bridge "in accordance with plans, drawings and specifications to be hereafter submitted by the Bridge Company to the County, and which said plans, drawings and specifications shall become upon acceptance by the County a part of the contract of December 18, 1911, and shall be annexed thereto and marked 'Plans for Rexford Bridge' and shall be substituted for the plans, drawings and specifications heretofore made a part of the contract of date December 18, 1911."

The substituted contract also provides that the Bridge Company upon these changed specifications is to receive additional compensation in the amount of $3487.00.

The evidence shows that the National Surety Company executed a bond guaranteeing the faithful performance of a modification of the contract of December 18, 1911, by the Coast Bridge Company under date of December 20, 1911.

(See bond as attached to complaint, pp. 26-28.)

By the terms of the bond it is recited that the Coast Bridge Company under contract of December 18, 1911, was to construct a two-span riveted bridge over the Kootenai river at Rexford, Montana, together with three concrete piers; and it is recited that changes had been made in the original plans and specifications and a new contract had been made and entered into in accordance with which changed plans and specifications and by the terms of the contract the Coast Bridge Company was to construct a two-span riveted bridge over the Kootenai river at Rexford. This bond shown on page 29 was executed under date of December 20, 1911, and of course by its terms excludes any reference to the contract of February 5, 1912, being executed under prior date and referring to a different character of bridge to be constructed.

The evidence shows that the bridge constructed was materially different in character than the one covered by the bond of the defendant National

Surety Company, and was a 440 foot bridge and consisted of two 220 foot, pin-connected spans, resting upon one concrete pier and two tubular shore piers in place of two 200 foot riveted steel spans resting upon three concrete piers.

The evidence further shows that the location of the concrete pier was changed after the work had been started upon the bridge, in fact after the originally contemplated pier was in the course of construction and the new pier was constructed further out in the channel of the river some sixteen feet and in a more dangreous position for the pier. This change was made by the direction of the County and over the objection of the Coast Bridge Company, and upon the statement to the County by the Coast Bridge Company that if constructed at the new location it should be constructed upon the "force account" (p. 110), which would place the construction of the new pier outside of any contract.

The evidence shows that the excavation for the piers should be sunk to the elevation called for on the plans, and that after the excavation should be made to the full depth piles should be driven inside, if so ordered by the engineer (p. 23). The specifications also provide that the piles were to be cut from live trees not to be less than twelve inches at the large end nor less than nine inches at the small end, and if found necessary in driving should be shod with steel or cast iron shoes (p. 16). The contract also provided that if piling should be re-

quired under any of the piers the price to be paid for a piling should be forty cents a lineal foot, and that the length of said piling should be specified and determined by the county or its representatives.

The contract also provided that if any additional concrete should be required in the construction of the piers the County should pay $10 per cubic yard for the concrete above water line and $15 per cubic yard for concrete below water line; further, that if the full amount of concrete specified in the plans and specifications for the piers should not be required, the County should have the benefit of a reduction in the price for the pier at the rate of $13 per cubic yard for the concrete below water line and $8 per cubic yard for the concrete above water line. So that as to the amount of concrete used in the construction of the piers either more or less than that called for in the specifications and plans, and also with respect to whether piling should be used in connection with the concrete in the construction of the piers, and the length of such piling, those matters were to be determined by the County and paid for at unit prices, so that the amount required and used would determine the amount to be paid. It was not optional with the contractor to increase or decrease the cost of the bridge by increasing or decreasing the amount of concrete to be used in the piers, or by using or not using piling in the construction of the piers. It was for the contractor to do as directed in those

matters by the County (pp. 64, 65).

The evidence shows that the piling used were 22 feet in length, and were eight by eight (p. 94), and that sixty-two piling were used in the pier (p. 106), while the plan showed the location of thirty-eight piles, if piling should be required.

The evidence further shows that an eight by eight, 22 foot piling embedded four feet in the ground would sustain a weight of approximately 30,000 pounds, and that a 2000 pound hammer falling twenty feet would strike 40,000 pounds to the foot, or a total of 800,000 pounds; that the blow would be more than 400 per cent greater than the piling would stand (pp. 104, 105);—according to Carnegie "Pocket Companion" edited by Carnegie Steel Company of Pittsburgh, Pa. (1916 Edition), page 363, a round wooden pile 12 inches at each end, 22 feet long, embedded 4 feet, of white pine or tamarack, will stand a weight of 79,200 pounds.

The evidence further shows through the opinion of Mr. Kennedy, called by the County of Lincoln, that the direct cause of the collapse of the bridge was the undermining of the pier by the washing of the river (p. 96); that the piling themselves under the pier were not driven sufficiently after the underwash to support the weight of the pier (p. 96); that when the wash had proceeded to probably the center or slightly beyond the center of the pier, the pier started to dip upstream and hung in that position for some time as the

wash proceeded, and when it reached a certain angle it sheared off the piles, as Mr. McCall reported to him. The piles were sheared off of the upstream end and pulled on the downstream end, and then the pier toppled over sidewise.

Mr. Kennedy also testified that if the piling had been driven with a 2000 pound hammer falling twenty feet, so that with the last blow the piling would not penetrate to exceed one-half inch, the pier would not have toppled over (p. 97).

The witness McCall for the County, who was the diver, reporting the condition to Kennedy, stated that all except sixteen of the piling were sheared off flush with the concrete, and that sixteen were protruding out of the concrete a distance of about three feet eight inches (p. 94). Further that after the excavation was completed for the pier in question the County, through its engineer and board of commissioners, measured the hole (p. 106), and directed the Bridge Company not to put in the concrete upon finishing driving the piling until the commissioner, Mr. Geary, was notified, and that Mr. Geary, the commissioner, was notified and inspected the piles after they were driven and before the concrete was placed in the excavation over them (p. 107); further that the man in charge of erecting the bridge for the Bridge Company acted under the direction of the commissioners and county surveyor (p. 108).

Mr. Raynor, a witness for the defendant, testified that he drew the plans for the bridge and left

the matter of the depth of the excavation open, so that it could be determined when the excavation was made and when the actual conditions would be known to what extent the excavation should be made, and with respect to piling in the foundation for the piers witness testified that that matter was left open so that the County should determine when the excavation was made how many piling were to be used, if desired by the county; that is, that the County was to determine whether piling were to be used or not, and that after the excavation was made piling were to be driven if ordered by the engineer for the County. Witness further testified that if the matter of using piling under the center pier had been left to him he would not have used piling at all, but would have carried the concrete down lower, and that in his judgment the driving of piling was not practicable; that the information which he had in the drawing of the plans with respect to these matters he obtained from the County engineer of Lincoln County, and particularly from a profile prepared by that engineer (p. 103-104).

The evidence further shows that the County was to pay for the construction of the bridge contemplated by the contract of December 18, 1911, certain specified amounts at certain specified times (p. 64), providing in part that twenty-five per cent was to be paid upon the completion of the concrete piers, fifty per cent upon the arrival of the steel for the bridge at the bridge site, and

the remaining twenty-five per cent within thirty days after the completion and acceptance of the bridge. The evidence, however, shows that the County disregarded these provisions, and by resolution under date of July 26, 1912, changed the terms and conditions of the contract of December 18, 1911, in so far as the same provided for payments to the Coast Bridge Company, and provided for a payment of $12,500, or nearly one-half the contract price, to the Coast Bridge Company before any of the work was done upon the bridge in question, in fact before any of the materials had been delivered at the bridge site (pp. 88-90), and the warrants issued by the County evidencing payment (pp. 99-102) are shown commencing July 26, 1912 a payment of $12,500, October 21, 1912 a payment of $2500, October 21, 1912 a payment of $10,000, and other payments aggregating the total amount which was paid for the construction of the bridge.

Further, that under date of December 28, 1912, the board of county commissioners passed a resolution accepting the bridge in question (p. 92).

The contract, dated December 18, 1911, introduced in evidence, shows the following condition precedent (p. 66):

> "It is further agreed and understood by and between the parties hereto that this contract shall not take effect until the War Department of the United States has approved the plans and specifications and granted permission for the construction of said bridge, and the authority for the construction of the

same shall have been granted by the congress of the United States."

There is no allegation in the complaint and no evidence in the case with respect to the matters contained in the above provision of the contract.

PROPOSITIONS AND AUTHORITIES RELIED UPON IN THIS APPEAL

I.

The complaint does not state a cause of action.

(a) The complaint does not allege performance of the contract sued upon by the plaintiff;

(b) The complaint does not allege a compliance with the condition precedent as to taking effect of the contract, namely, that the War Department of the United States should approve the plans and specifications prior to taking effect of the contract;

(c) There is no allegation in the complaint that the bond sued on covered the construction of the bridge in question, or guaranteed the performance of the contract of February 5, 1912;

(d) There is no allegation in the complaint that the bond company had knowledge of or consented to any changes in the contract referred to in the bond, or that the bond should cover a subsequent contract calling for a bridge of a different character than the one referred to in the contract and named in the bond.

II.

The evidence shows that there were changes made by the County in the construction of the bridge which released the surety on the bond guaranteeing the performance of the original contract:

(a) A material change in the location of the concrete pier in the stream;

(b) A material change in the length of the spans of the bridge and in the character of the spans changing from a riveted steel span to a pin connected span bridge.

III.

The evidence shows that there was a material change in the contract in the time of payments to be made the contractor, which would release the surety.

IV.

The evidence shows a want of compliance in the provision requiring the approval of the War Department of the plans and specifications as a condition precedent to contract taking effect.

V.

The evidence fails to show

That the bridge fell because of any failure on the part of the Bridge Company in the construction of the bridge according to the plans and specifications therefor; or under the direction and supervision of the plaintiff County.

VI.

The County accepted the bridge, made full payment therefor to the Bridge Company as being in

full compliance with the orders and directions of the County and the plans and specifications.

We will present our argument under the above six heads and numbers.

I.

The contract sued upon, together with the specifications which are a part thereof, show many acts which are to be performed by the county prior to and during the construction of the work. The complaint contains no allegation of performance on the part of the county at all, except it is alleged that certain payments were made by the county, and it is shown that the contract of Dec. 18, 1911, which is the only one upon which plaintiff in error was surety (page 66), by its terms was not to become a contract until the War Department of the United States had approved the plans and specifications and given authority for the construction of the bridge. There is no allegation that this was ever done. We take it that it is elementary that a person declaring upon a contract must show first, the defendant is in default, and second, that the plaintiff has performed or tendered performance. That is, that the plaintiff has performed or facts excusing such plea of performance.

There is nothing in the statutes of Montana which changes these rules of law. It is provided in Section 6572, Revised Codes of Montana 1907, being section 746 of the Code of Civil Procedure:

> "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the fact showing such performance."

The complaint does not in any respect comply with this section. There is no excuse or justification that this allegation be omitted. The contract specifically states that it is not to become a contract until certain things happen.

In **9 Cyc., page 700,** it is said:

> "If a party undertake that a condition shall be performed by a stranger and the latter refuses, this is no excuse unless such refusal be procured by the other party. That an obligation to pay money may be dependent upon the action of a third person over whom neither party has any control, and that payment cannot be exacted unless the specified act is performed, is familiar law."

Within the foregoing rule it would seem to be apparent that the failure to allege that the War Department had approved the plans and specifications and granted permission for the construction of the bridge, would render the plaintiff without standing in this case. Moreover, the complaint alleges the making of a contract on the 18th day of December, 1911, the changing and altering thereof during the month of February, 1912, and at the outset of the trial plaintiff amended to allege a contract made on the 18th day of December, 1911, and the modification thereof on the 5th day of

February, 1912. The complaint alleges that by the changed and altered contract, Coast Bridge Company was to do certain things and that the Coast Bridge Company did not do these things. It does not allege that by the original contract the Coast Bridge Company was to do certain things and failed to do them, so that the only allegation of breach on the part of Coast Bridge Company is in regard to the contract of February 5, 1912. The bond upon which suit is brought is dated the 20th day of December, 1911, and refers to a contract made on the 18th day of December, 1911, and certain changes made thereto, and it is obvious that a bond executed on the 20th day of December, 1911, would have no reference to a changed or new contract made on the 5th day of February following. Moreover, there is no allegation that National Surety Company executed any bond to cover the new contract of February 5, 1912, which it is claimed Coast Bridge Company breached. Quite the contrary, it is alleged on page 4 of the record, paragraph 6 of the complaint, "That on the 18th day of December, 1911, in consideration of the said contract above mentioned the said defendant, Coast Bridge Company, and the said defendant, National Surety Company, made, executed and delivered to the said County of Lincoln their obligation, etc." It seems to us that the plaintiff suing because of the breach of a changed and altered contract dated February 5, 1912, cannot hope to hold the Surety Company who had

nothing whatever to do with that contract and whom the complaint alleges executed a bond to cover a contract dated the 18th day of December, 1911. We take it that a reading of the complaint will show no allegation of a respect in which plaintiff claims that Coast Bridge Company breached the contract of December 18, 1911. This being true, it follows that no cause of action is stated against National Surety Company because National Surety Company, as shown by the bond and as specifically alleged in the complaint, had nothing to do with a contract made on the 5th day of February, 1912. Furthermore, even if it could be claimed by any possible stretch of imagination that National Surety Company was concerned with a contract made on the 5th day of February, 1912, still the complaint alleges, as construed with Exhibit "A" attached thereto (p. 8) that the County had decided to alter the dimensions of the bridge referred to in the contract of December 18, 1911, and increase its length. These alterations, extensions and enlargements are to be made in accordance with specifications and plans thereafter to be agreed upon between the parties, and the county agrees to pay the Bridge Company in consideration of these alterations, extensions and enlargements the sum of $3487.00 in addition to the amount named in the contract of December 18, 1911. With all these changes, with the definiteness of the contract of the Surety Company, dated December 18, 1911, entirely dissipated and a new one which was

thereafter to be agreed upon between the parties substituted in its place, the complaint does not contain the faintest suggestion that the Surety Company knew anything about these alterations, extensions and enlargements which were to be made according to plans thereafter to be agreed upon. It seems to us that if a surety can be held to have guaranteed any sort of an indefinite contract which parties might thereafter agree upon, when the surety had originally guaranteed a definite, certain contract, that there is no limit to the surety's liability—they could be held for anything. If a surety signed a bond in a county one year, he could be brought to a realization in later years that his liability had been extended to other contracts covering liabilities which were not in the contemplation of any parties when he gave his bond, and of the existence of which the surety had not the least suspicion. While we understand that suretyship is a hazardous undertaking, still we do not believe that a case can be found anywhere that will hold a surety or any other party to the performance of a contract which it is not even claimed that he knew about, much less was a party to. The thought we urge here is brought out in **United States vs. Weisberger,** decided by this Court August 4, 1913, reported in **206 Federal 641,** an action in which United States of America sought to hold a surety because of the additional cost to it of completing a contract in a substantially different manner than the Surety Company's principal had agreed to execute the work. It is said:

"To hold him or his surety liable for the excess of cost of substantially different work would clearly be to hold them liable for something for which they did not bind themselves and the cost of which they might have no means of determining."

II.

The evidence shows that there were changes by the County in the construction of the bridge which released the surety on the bond:

(a) There was a material change in the location of the concrete pier, in that it was moved some sixteen feet further out into the stream where it was more subject to dangers from the wash by the stream at the foundation;

(b) There was a material change in the length of the spans increasing the length from 200 to 220 feet for each of the spans, thereby increasing the weight which would rest upon the center pier, and there was a material change in the character of the spans, changing the bridge from a two span riveted bridge to a two span link connected bridge.

It is our contention that these material changes and departures from the contract of December 18, 1911, without the knowledge or consent of the bond company would release the bond company, and particularly in view of the fact that the plaintiff sought to show that the bridge fell because the pier was undermined by the wash of the river to such an extent that the piling in the foundation of the pier failed to support the pier and the bridge fell. The fact is conceded that the pier was moved

out into the stream some sixteen feet where it was more subject to the wash of the river than at the location specified in the plans for the bridge. In other words, the County caused the pier to be moved out to a point in the river where the wash at the foundation of the pier would be greater than at the location fixed in the original plans and the complaint in this action. Because the river did wash under the concrete in the foundation of the pier and caused the pier to fall, there is a direct connection between the cause of the pier falling and the location of the pier as shown by the evidence and the allegations of plaintiff's complaint. The relocation of the pier was without the knowledge or consent of the bond company. The hazard of the bond company's undertaking was increased by the act of the County, and the cause of the failure of the bridge is due to the falling of the pier which was undermined in its new location where it had been placed by the County without the approval or consent of the bond company.

Further, the weight resting upon the pier was greatly increased by the lengthening of the spans from 200 feet to 220 feet, or adding 40 feet of superstructure, which was to rest upon the center pier. The increased weight, according to the testimony, would have to do with the failure of the foundation under the pier to sustain the load. The plaintiff alleged and sought to show that the piling in the foundation was not sufficient to carry the weight of the pier and the bridge, so that the in-

creasing of the weight by adding 40 feet to the spans which would rest upon the center pier had materially to do with the weight of the span resting upon the pier and with the falling of the pier.

The evidence shows the further material change. In the original plan, and in the modified plans referred to in the bond under date of December 20, 1911, the bridge was to consist of two riveted steel spans, while the bridge constructed under the direction of the County was a two-span link connected bridge. The riveted steel span bridge would have been firmer in place and would have tended to sustain the pier in its proper position, whereas the link connected span would buckle under any end pressure and would not resist the weight of the pier.

In **United States v. Freel, 186 U. S. 309, 46 L. Ed. 1177,** in the syllabus, the court say:

> "The surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock was released by a change made by the contracting parties without his consent, in the location of the dry dock, which required the contractor to make additional excavations and connections with the water at an increased expense, and gave an increased time of performance, as such a change was not contemplated by the provisions of the contract for such changes in the plans and specifications as might be found advantageous or necessary.
>
> "The objection that the surety should have set up as an affirmative defense by plea or answer and not by demurrer, the fact that

> such changes were made in the principal's contract as would release the surety if made without his consent, cannot be urged on appeal, where the declaration set out the original and supplemental contracts and contained no averments that the surety had knowledge of or consented to the changes made by the supplemental contract, and no leave to amend was asked when the demurrer was sustained."

In this case, the provisions of the contract authorizing changes and alterations or modifications in the construction of the dry dock were set out and are more comprehensive than the provisions in the contract of December 18, 1911, in the case at bar. In the Freel case the court will note from an examination of the opinion that two changes were made, each of which is covered by a written contract signed by the principals to the original contract which had been guaranteed by the surety. The first modification provided for an increase in the length of the dock from 600 to 670 feet, and provided for an increased compensation in the amount of $45,556 for the increase in the length of the pier; the second modification of the original contract was made by written agreement between the principals to the original contract providing that the pier should be located 64 feet nearer land than the original location, and provided for additional compensation in amount of $5063.18, and extended the time some eight weeks for the construction under the new conditions. The principal in the bond partially completed the dock, but because of delay in the construction the government

took the work over and completed it and sued the principal and his bondsman. The surety on the bond defended on the ground that he was released by reason of the modifications in the original contract which were made without his consent or approval.

The circuit court of appeals in considering the case held that there was a change in the substance of the contract not contemplated thereby which released the sureties on the contractor's bond who did not assent thereto from liability (99 Fed. 237).

The Supreme Court in reviewing the judgment of the Circuit Court of Appeals in the opinion say:

> "Coming then to the question of the effect on the responsibility of the surety of the supplemental agreement of August 17th, we agree with the Circuit Court and the Circuit Court of Appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety, and extinguished his liability. The seventh section had in view such changes as might be found advantageous or necessary in the plans and specifications. But the changes called for by the new agreement had no reference to the original plans and specifications, but changed the location of the dry dock, requiring the contractor to make additional excavations and connections with the water, at an increased expense, and gave an increased time of performance."

And further:

> "The further contention is made in the government's brief that, even if substantial changes were made under the contract as would release the surety, being made without his assent, the fact of such changes should

have been set up by the defendant as affirmative defense, by answer or plea, and not by demurrer.

"The declaration set out, by attaching them as exhibits, the original and the two supplemental contracts, and it is alleged that the changes affected by the latter were made in pursuance of and in conformity with paragraph seven of the first contract. If upon the face of the agreement of August 17, 1893, it appears that substantial changes were made in the location of the proposed structure, requiring additional excavation and connections at an increased expense, and extending the time limited by the contract for the completion of the dry dock, for a period of eight weeks, on account of the change in the position of the dry dock, and if, as is conceded by this objection, such substantial changes in the location, cost, and time necessary for the completion of the work, operated to release the surety, if made without his knowledge and consent, then the declaration put the plaintiff out of court, so far as the defendant surety was concerned, unless it was averred that the latter had knowledge of the changes and consented thereto."

In **American Bonding Co. v. United States, 167 Fed. 910,** decided February 1, 1909, by this Court, in the opinion this Court says:

"The recent case of United States v. Freel, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177, is more in point, and is authority upon all the questions involved in this case. The action was against the principal and sureties on a contractor's bond, given to secure the performance of contract to construct a dry dock at the Brooklyn Navy Yard. The contract was between the contractor and the Chief of

the Bureau of Yards and Docks in the Navy Department. It provided for the construction of a dry dock——
'to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part.'

"The seventh paragraph of the contract provided (substantially as in the contract before the court) that:

" 'If at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract.'

"It was further provided:

" 'That if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of the dry dock, that the actual cost thereof shall be ascertained, established and determined by a board of naval officers to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract.'

"It was further provided:

" 'That no change herein provided for shall in any manner affect the validity of this contract.'

"A supplemental contract in writing was entered into between the contractor and the Chief of Yards and Docks, providing that the location of the dry dock should be——
'one sixty-four (164) feet further inland than laid down and staked out when the said contract was entered into.'

"This supplemental contract provided full

compensation to the contractor for the additional work, and it recited that it was under the provisions of and in accordance with article 7 of the original contract, but the surety was not a party to the supplemental contract. The contractor proceeded with the work under the original and supplemental contract, but so slowly, negligently, and unsatisfactorily that the Secretary of the Navy, under the option and right reserved to him by the said contract, declared the contract forfeited on the part of the contractor, and thereafter, under the provisions of the contract, the Secretary of the Navy proceeded to complete the dry dock and appurtenances in accordance with the contracts, plans, and specifications, at a cost to the United States of the sum of $370,000. The sum of $72,414.16 represented the damage sustained by the plaintiff in completing the contract. The suit was brought to recover from the contractor and his sureties the damages alleged. The sureties interposed a demurrer, on the ground that the plaintiff did not state facts sufficient to constitute a cause of action, and the question was whether a surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock was released by subsequent changes in the work made by the principals without the consent of the surety. It was claimed on behalf of the United States that the change made in the original contract by the supplemental agreement was within the contemplation of that contract, and must be deemed to have been assented to in advance by the surety. The trial court held that this change was not within the scope of the original contract, but was such a change that exonerated the surety from liability for the subsequent dereliction of his principal. This view of the

contract was affirmed by the Supreme Court, which, after citing authorities relating to the liabilities of sureties, said:

" 'The proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the state and federal courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case. United States v. Freel (C. C.), 92 Fed. 299.'

"It will be observed that, unlike the case before this court, the change in the original contract was made in accordance with the terms of the contract and the change agreed to by the parties to the contract in writing, but, like the present case, the consent of the surety to the change was not obtained, and it was upon that fact that the surety was held not liable. It will be observed further that the contractor was to be compensated for the additional expense in making the change, so that the surety was in no way injured by the change in the contract. The surety was, nevertheless, held discharged from liability. This case is a sufficient answer to the contention of the United States in the present case, that the change in the contract was not material to the plaintiff in error. It is not necessary to review the cases bearing upon this last question. They are numerous, and the law has been authoritatively determined. The surety has the right to stand upon the very terms of his contract. If the conditions of the liability have not accrued under the terms of the con-

tract, the surety is not liable, and if a change is made in the contract without his consent his liability is at an end, even though it may appear that the change is for his benefit."

III.

The evidence shows that there was a material change in the contract in the time of payment to be made the contractor, which would release the surety:

(a) The evidence shows that $12,500 was paid the contractor in advance of doing any work upon the bridge in question (p. 99);

(b) The evidence shows that by resolution the County purported to modify or change the terms of the contract as to the time of payment (see p. 89), and not only provided for the $12,500 advance payment, but paid an additional $12,500 on the bridge by the 21st of October (p. 100), so that before the pier was constructed $25,000 had been paid the contractor contrary to the terms of the original contract but in conformity to a resolution purporting to amend the terms of the original contract passed in July, 1912, modifying and changing the time and terms for payment, but which was without the knowledge or consent of the surety, and it is shown by the evidence that all payments were made prior to times fixed in the contract, in fact the plaintiff's attorneys concede this to be true, and in this situation the surety was released from further liability under the bond.

In **First National Bank of Montgomery v. Fi-**

delity & Deposit Company of Maryland (Ala.), 40 So. 415, in the syllabus it is said:

> "Making payments before they are due under the terms of a building contract will release a surety on the contractor's bond."

In the opinion it is stated:

> "It is a maxim of law that all parties, whether principal or surety, who reduce their contracts to writing have a right to insist upon the terms of the contract as written; and it does not lie in the power of the courts to say that, although a party has contracted to do one thing, yet he has done something else, which is more beneficial to the other party and is therefore entitled to the enforcement of the contract. When a party enters into a contract to do certain work and on certain terms, and procures a surety to guarantee the faithful performance of the work, the surety necessarily contracts with reference to the contract as made. The terms of the contract become a part of the terms of the bond. Otherwise the surety could never know what obligation he was assuming. The contracts are made at the same time. The surety's bond recites that, whereas the building contract has been made, etc. Then, in the absence of any explicit declaration to that effect it is difficult to see how a court can undertake to say that certain provisions are made for the benefit of the principal alone and can be waived or changed by him, without the consent of the surety. This is a matter, however, that has been so thoroughly discussed by the courts in England and in this country, and the trend of the best authorities so evident, that it seems useless to go over the arguments of the courts.
>
> "The leading case in England is that of Calvert v. London Dock Company, 2 Keen 638. And the Supreme Court of the United

States, in an able opinion by Justice White in which he reviews the decision of that court and others, plants itself squarely on the English doctrine, declaring that 'The rulings of this court have been equally emphatic in upholding the right of a surety to stand upon the agreement with reference to which he entered into his contract of suretyship, and to exact strict compliance with its stipulations.' Prairie State National Bank v. United States, 164 U. S. 227.

"Equally emphatic are the cases of Simonson v. Thori, 36 Minn. 439, 31 N. W. 861; United States v. American Bonding & T. Co., 89 Fed. 925; Backus v. Archer (Mich.), 67 N. W. 913, and cases cited. * * * *

"The cases referred to by appellant's counsel which hold that, where a collateral security has been released, or lost, without the consent or fault of the surety, said surety is released only pro tanto, do not apply to a case like this even as to the ten per cent reserve. Said provision in this case is one of the conditions of the contract, and it cannot be said that it is a mere security for the payment of such money, but it is reserved as much as a stimulus to insure the completion of the work by the contractor, as for a mere security of the amount of money."

In **Taylor v. Jeter, 23 Mo. 244,** it was held that sureties upon a similar contractor's bond had a right to stand upon the agreement that the owner would not pay the contractor during the progress of the work more than seventy per cent of the value of the work done; and if he did pay more without the consent of the sureties, they were thereby discharged. And this decision is cited

with approval and followed by **Evans v. Garden, 125 Mo. 72, 28 S. W. 439, Ryan v. Morton, 65 Texas 258.**

In **Welch v. Hubschmitt Bldg. & Wood Working Co., 61 N. J. Law 57, 38 Atl. 824,** it was held that, by paying a part of the second installment to the contractor before it was due under the contract, the owner discharged the surety from all obligation; and to the same effect, **St. Mary's College v. Meagher (Ky.), 11 S. W. 608.**

In **Wehrung v. Benham (Or.), 71 Pac. 133,** it was held that the sureties were released where the owner paid for all the work as it progressed, while the contract provided that 25 per cent of the amount due was to be retained for thirty days after completion of the work.

And in **Cowdery v. Hahn (Wis.), 81 N. W. 882,** it was held that payment in full by the owner before the building was completed worked as an absolute release to the sureties upon the contractor's bond.

In the case of **Tuohy v. Woods (Cal.), 55 Pac. 683,** the court said:

> "When a surety has shown that the contract to which he became a surety has been changed, he has then shown that there has been an attempt to make him liable on a new and different contract; and the burden is then upon the other party to show that the surety has consented to the new contract."

In the case of **Barret-Hicks Co. v. Glas (Cal.), 99 Pac. 856,** the court said:

> "It is well settled law that a surety may stand upon the strict letter of his bond, and that where a principal has, without the consent of the surety, materially violated the terms of an agreement for the performance of which the surety stands sponsor, the latter is exonerated from all liability upon his bond. This principle has been many times applied where the surety has guaranteed the faithful performance of building contracts."

In the late case of **Dunne Inv. Co. v. Surety Co. et al, 150 Pac. 411,** the Supreme Court of California said:

> "A surety is exonerated in like manner with a guarantor, for section 2840 of the Civil Code so expressly provides, and a guarantor is exonerated, except in so far as he may be indemnified by the principal, 'if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditors against the principal, in respect thereto, in any way impaired or suspended.' Where the original obligation of the principal is so altered, or the remedies or rights of the creditor against the principal so impaired or suspended it is thoroughly settled by our decisions that no inquiry will be allowed as to whether or not the surety was in fact injured thereby."

In the case of **Reese v. United States, 9 Wall. 13, 19 L. Ed. 541,** the court, in discussing the liability of sureties, said:

> "Any change in the contract, on which they are sureties, made by the principal parties, to-wit, without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in

its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

The Circuit Court of Appeals for the Eighth Circuit in the case of **National Surety Co. v. Long, 125 Fed. 887,** in an opinion by Circuit Judge Sanborn, said:

"Moreover, it is not indispensable to the validity or to the enforcement of this plain covenant of the obligee—this condition precedent to the liability of the defendant under the bond—that the latter should show that it has sustained injury from the failure to fulfill it. Parties to agreements have the right and the power to contract that things immaterial as well as things material shall be the subject of their warranties, or of conditions precedent to their respective liabilities, and their contracts in the one case are as legal and binding as in the other. The all-sufficient, the conclusive, answer to the suggestion that the subject of the warranty or of the condition precedent is immaterial, and its breach without effect, is that the parties had the right to agree and they have contracted otherwise. The immateriality of a warranty or of a condition precedent made by the agreement of the parties, and the innocuousness of a failure to perform it, do not nullify or mitigate the fatal effect of the failure prescribed by their contract."

In the case of **Coughran v. Bigelow, 164 U. S. 301, 41 L. Ed. 442,** which involved the question of liability of sureties on a bond conditioned for the performance by the principals of the terms of

a contract for the sale of land, the court in the opinion said:

> "The solution of the difficulty thus created will be found by reading the bond in the light of the contract, to secure the performance of which was the purpose of the bond. The contract provided, indeed, that the vendors should execute and deliver a proper deed, but also provided that the title should not pass until the deferred payments were made. To construe the bond as compelling a conveyance before such payments were made would deprive the vendors of the security given them by retaining the title, and also of their stipulated right to forfeit the cash payment and rescind the sale, if the payments were not made as provided in the contract.
>
> "The obligatory portion of the bond was expressly made dependent on the proviso that Coughran and Cottrell should comply with their portion of the contract that day made and a copy of which was attached, one of terms of which was that the sum of $3,334 should be paid on October 1, 1890. This payment was not so made on that day. The acceptance by the vendors of the payment subsequently made, on or about October 12, was, of course, a waiver by them of their right to rescind and declare a forfeiture, but such waiver did not bind the sureties, who were relieved from liability by the failure of the vendees to perform the precedent act of payment at the time provided in the contract."

IV.

On page 66 of the record it is shown that in the contract of December 18, 1911 that the parties agreed that the contract should not become effective until the War Department had approved the

plans and specifications and granted permission for the construction of the bridge. We think that the evidence clearly shows that the bridge contemplated in this contract of December 18, 1911 was in fact never constructed, which, of course, would do away with the necessity of any approval of the plans and specifications therefor or any permission for its construction. However, without regard to the sufficiency of our contention that the plans and specifications of the bridge referred to in the contract of December 18, 1911 were not in fact the specifications finally used for the bridge finally built, still we urge upon Your Honors that parties competent to contract may agree between themselves that a writing shall not become effective as a contract until the happening of some contingency. We submit to you that the parties did make such an agreement here. In other words, the writing is a conditional contract and to become a contract and to render parties liable thereon only if the War Department of the United States thinks that it is proper to construct a bridge at this particular place, and that the plans and specifications tendered are sufficient for that purpose. Your Honors can readily see a substantial reason why a surety would be willing to guarantee the performance of a contract where all of its terms had previously been passed upon by expert, disinterested engineers, when the surety might not be willing to guarantee the same contract if it was not to be passed upon by the expert, disinterested engineers.

The County was interested in getting as much for its money as it could. The contractor, of course, was interested in getting as much for the work performed as he could. The surety is interested in the subject matter concerning which the County on the one side and the contractor on the other are bargaining, and in this situation the surety says "I will guarantee that a bridge constructed in accordance with these plans will be a good bridge provided a disinterested engineer, to-wit, the engineers of the War Department approve them for use at the specified location." We take it that if the surety is to be held for the insufficiency of a bridge, which is claimed to have been placed within the purview of his obligation, that it must be shown that the bridge concerning which suit is brought is a bridge erected according to plans previously approved by the War Department. The contractor and the County might make a number of agreements between themselves as to different bridges but it is manifest that in order to hold a surety he must be sued concerning a bridge which was erected under the conditions solemnly agreed upon in his contract. The evidence not only does not show that the War Department ever approved these plans and specifications, but on the contrary it shows that these plans and specifications were never used, and it is further shown by the undisputed testimony of Mr. R. A. McClayn (p. 105) that during the progress of the work Mr. Geary, acting for the County, had the pier, which finally

went out, placed sixteen feet nearer the Rexford side, and which is shown on page 106 of the record to have placed the pier ten feet further out in the center of the river, thus giving the river a bigger sweep at the pier, and this same witness McClayn's uncontradicted testimony (p. 105), "No change was made in the plans." So you see that not only the plans that the Surety company contracting concerning were never used, but after others were used, they were not approved by the War Department; and above all the County at least acquiesced in the construction of this pier different from any plan, so that in addition to having no evidence in the record that the plans were approved by the War Department, you have an affirmative showing that the plan of the bridge as constructed and particularly as to the center pier, was never written out, which makes it conclusive that the plan actually followed could not have been submitted to the War Department. There is no claim that this change was made by the Bridge Company fraudulently or without the consent of the county, but on the contrary the entire record shows that the county insisted upon these changes notwithstanding this plan, and that the Coast Bridge Company instructed its construction foreman (pp. 109 and 110) that he had authority only on behalf of the Bridge Company to make this change if the County by written instructions ordered its construction under force account. In other words, the Bridge Company took the square position—and its con-

struction foreman had no authority to take any other—that it would not agree to the construction of this pier in a manner different than shown upon the changed plan. We contend that this testimony makes an affirmative showing of a substantial default on the part of the County and substantial injury to the Surety thereby.

The provision to the effect that the contract shall not become effective until the plans and specifications are approved by the War Department is not unlike provisions so frequently found that payment shall not be due until certified by engineer or architect, and in **McGlauflin v. Wormser, 72 Pac. 428,** the Supreme Court of Montana with regard to this sort of provision say:

> "The action is based upon a written contract entered into between the parties for the construction of a dwelling house. It provides that 'all payments shall be made upon the written certificates of the architect to the effect that such payments have become due.' It also provides that the different payments shall be made when certain work about the building is completed, and that the final payment shall be due 'when the entire work is completed and accepted.' By the terms of this contract, under the law, the obtaining and presentation of a certificate of the architect was a condition precedent to the final payment on the contract becoming due. Therefore the complaint must state that such certificate was given or demanded, and, if refused, the reasons why it should have been given, or, if waived, a statement of that fact. We find no allegation in the complaint to that effect. This being true, it is not sufficient to

support the judgment given by the court below. The motion for nonsuit made by the defendant should have been sustained upon this ground. Michaelis v. Wolf, 136 Ill. 68, 26 N. E. 384; Hudson v. McCartney, 33 Wis. 331; Hanley v. Walker, 8 L. R. A. 207; Byrne v. Sisters of St. Elizabeth, 45 N. J. Law, 213; Beharrell v. Quimby, 162 Mass. 671, 39 N. E. 407; Cox v. McLaughlin, 63 Cal. 196; Schmidt v. North Yakima (Wash.), 40 Pac. 790."

V.

There is no evidence in the record upon which it can be said that a default of the Bridge Company caused the collapse of the bridge. It is claimed that the bridge fell because of the insufficiency of the piling. Assuming that the specifications (p. 11 to 25) said to be the specifications referred to in the contract of February 5, 1912 are controlling. The reference to the piles is found on page 23 of the record. It is said:

"After excavation is made to the full depth, piles shall be driven inside, if so ordered by the engineer."

"The Piers and Abutments shall be sunk to the elevation called for on the plans."

(Page 24 of the record:)

"All piles shall be as called for under specifications and shall be of the length called for on the plans or of a length necessary to fulfill the following specification as to driving:

Piles shall be driven with a hammer weighing not less than 2000 lbs. The penetration under the last blow of the hammer falling twenty feet shall not exceed one-half inch. If necessary they shall be shod with steel or cast iron shoes and properly ringed at the top with a

wrought iron ring, to prevent their splitting or brooming. All piles which are broken, split or badly broomed and in the opinion of the engineer are not satisfactory, must be withdrawn and replaced by other piles to the satisfaction of the engineer or inspector in charge. (Page 16 of the record:)

"Piles are to be cut from live trees, and not to be less than 12 inches at the large end and not less than 9 inches at the small end. They shall be stripped from all bark; be straight and sound and free from wind shakes. If found necessary in driving, all piles shall be shod with steel or cast iron shoes to prevent their splitting or crushing under rapid blows of the hammer."

In the contract of December 18, 1911 it is said (p. 65):

"Length of such piling shall be specified and determined by the County or its representative."

From the foregoing it is seen that the depth of the excavation from the piers is determined by reference to the plans.

Witness Raynor (p. 103) testified that he drew the plans and did not indicate thereon how deep the excavation was to go but left that open to be determined when the excavation was being made so that the County could determine this and also could determine whether it desired any piles to be driven.

It will be noted that whether or not there were to be any piles driven was left to the County, and their length is specifically left to the County. It

is thus seen that the entire matter of the piles and their sufficiency is left to the County.

It is shown by the record that the County's officer, Mr. Duthie, County Engineer, measured the excavation when it was completed, and that Mr. Geary, one of the County Commissioners, inspected the piles after they were driven and knew their dimensions.

We contend that the County, having the authority to make a decision as to whether or not and what piles should be driven, thereby assumed the responsibility of the exercise of their judgment in allowing piles to be driven of which they had full charge and full knowledge. Moreover, it is shown by the testimony of the diver who made the examination for the plaintiff that all except sixteen of the piles had sheared off at the bottom flush with the concrete, and that sixteen were protruding out from the concrete a distance of about three feet eight inches. It certainly must be said that as to the piling which sheared off, the complaint of the plaintiff that they had not been driven sufficiently deep must be disregarded because no matter how deep they would have been all they could have done would have been to shear off. It is shown that sixty-two piles were driven beneath this center pier and with all but sixteen shearing off, it seems to us that it is nothing but the rankest sort of conjecture for the witness Kennedy to attempt to make a case for the plaintiff by giving it as his opinion that the pier would not have toppled over

if the piling had been driven to a point where with a blow of a 2000 lb. hammer falling twenty feet the penetration would not have exceeded one-half inch. The testimony is undisputed to the effect that with piling used of the size here—which size was fixed with the knowledge of the plaintiff—it would have been impossible to strike them with a 2000 lb. hammer falling twenty feet, as the blow would be about 400 per cent more than the ultimate strength of the piles. It should be carefully noted that there is not a scintilla of evidence that the particular piling which were driven could have been driven in a different manner than they were driven. The plaintiff makes no complaint about the size of these particular piling, and in fact it could not because they were used with its knowledge and it had the right to say whether or not they should be used. Plaintiff complains about the 2000 lb. hammer falling twenty feet and the amount of penetration upon the last blow only.

The witnesses for the defendant testified that piling should not have been used at this place, that instead the County should have exercised its option to have the concrete extended down lower. It should be borne in mind that the County had the right to say how deep the concrete should go and whether or not any piling should be used. All the witnesses agree that the wash below the concrete was the primary cause for the undermining and the consequent falling of the pier. This demonstrates that if the concrete had been carried down

below the wash of the river that the pier would not have been undermined. This is not based upon conjecture but upon physical facts which any one would know and also is borne out by the fact that all the engineers, both for plaintiff and defendant, agree that until there is an under-wash there is no undermining, and, if no undermining, no collapse of the pier. The Bridge Company had no right to say whether concrete should go down further or whether piling should be used instead, but it was a matter for the County to say. The Bridge Company's plans and the specifications placed the limit upon the authority of its construction foreman, and he had authority on behalf of the Bridge Company only to follow these plans and specifications except that if the County exercised its right, which it had, to substitute either piling for concrete or vice versa, that he was to follow their directions. The plaintiff cannot be heard to say that it relied upon the construction foreman because it had knowledge of the recitals in the specifications leaving these matters to the County, and it likewise had knowledge that the Bridge Company in sending out the foreman under these specifications had sent this foreman for the sole purpose of following out these specifications; and if the County wanted the foreman to make decisions for them in face of knowledge of the limitations of his authority on behalf of the Bridge Company, it seems to us that it must be said that even then the County must take the responsibility for the

exercise of judgment by the construction foreman. Upon this we contend, however, that the County is shown by the evidence to have knowledge of the piling driven and thereby to have exercised itself directly the discretion given it.

Your Honors in determining this matter should have in mind the situation at the site when this work was progressing. Here you have the County authorized to proceed in one of two ways—the Bridge Company absolutely subject to its direc- tions—the County exercises its discretion in certain matters; it now seeks to have the Bridge Company and its surety guarantee the exercise of judgment thus made by the County. You may well know that if at the time that the County had made its decision as to this pier and the using of piling, that if it had wired the Bridge Company or any of its responsible officers that they expected the Bridge Company to guarantee results, that the Bridge Company would promptly have refused to do it. Still, the County at this time seeks to place the Bridge Company and its Surety in precisely that position.

We contend that it is contrary to anything contemplated by the parties in the contract or to anything contemplated by the parties when this bridge was being constructed. If the Bridge Company had expected to take the responsibility for the decision as to carrying down the concrete, or the placing of the piles, it is shown to have skilled engineers in its offices in Portland, and certainly it

would have used this discretion by its engineers. The fact that it did not and the fact that the County had the right to do so ought to be a sufficient answer as to who was supposed to take the responsibility for a decision as to the manner of the construction of these piers.

Under similar circumstances this Court held in **Continental & Commercial Trust & Savings Bank v. Corey Bros. Const. Co., 208 Fed. 976,** that a contractor was not responsible for defects in the work where he did the same in pursuance to discretion exercised by the opposite party, and it is said (page 979):

> "There is evidence tending to prove that the dam was improperly constructed and in a manner different in some respects from that which was provided in the contract. * * * * No complaint is made of the core or of the material or method of its construction, but it is urged that the material for the embankment was neither deposited in place nor properly puddled in the manner prescribed in the contract. * * * * Undoubtedly a portion of the loose material was handled and deposited in a manner different from that which was prescribed in the specifications, and probably such deviation from the prescribed method contributed in some degree to the inefficiency of the dam. But however that may be, the evidence is that all that was done by the construction company was done with the knowledge and approval of the engineering company under whose supervision, according to the terms of the contract, the work was to be done."

VI.

At various places through the specifications it will be seen that duties are placed upon the County to exercise its judgment and make decisions on the work, and likewise there are references to its inspectors.

It is shown that the entire bridge was completed, payment therefor made, and it stood some months before being destroyed. In the complaint filed, Your Honors will note that the County takes the position that it neither had knowledge of these defects nor means of knowledge. We take it that the attorneys for the plaintiff advisedly took this position, as it is elementary that if the means of knowledge were open to them, this is the equivalent of actual knowledge upon their part. There is no claim in the complaint of any effort on the part of the Bridge Company to prevent them from obtaining all the information which they desired. On the contrary, by the specifications they are given, not only the right but the duty to know what is being done.

It seems to us very clear that the County by accepting this work, and making payments of its money, cannot by any allegations of its complaint offer claim that it did not have means of knowledge when the specifications specifically give it that means of knowledge and no action on the part of the Bridge Company is alleged which prevented it from obtaining that knowledge. The

complaint further alleges that the plaintiff could not by the exercise of reasonable or any diligence discover or know of the claimed defects, yet the specifications which they rely upon specifically give them the means of having all knowledge. Because the principle involved is by the complaint conceded, and the rules of law covering it elementary, we content ourselves with the citation of **Section 359 of Vol. 6, Ruling Case Law** to the effect:

> "Where work is accepted with knowledge that it has not been done according to the contract, or under such circumstances that knowledge of its imperfect performance may be imputed, the acceptance will generally be deemed a waiver of the defective performance. But this rule does not apply to latent defects. The acceptance of work which has been defectively done, the defects being unknown and not discoverable by inspection, does not amount to a waiver of the imperfect performance. Ordinarily where a building has been accepted by the architect and the owner, it cannot, in the absence of fraud or mistake, be shown that the work was not performed according to the contract."

Bearing in mind the fact that the specifications specifically give the County not only the right to inspect but the duty to make the decision with regard to what is now claimed to be a defect, we think it should be very clear that the effect of this acceptance be binding upon the County in the absence of any issue being tendered in the complaint as to the Bridge Company fraudulently preventing the County from exercising the rights given it under the contract.

CONCLUSION

We submit that judgment should be reversed and the action dismissed.

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